IN THE 10

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

No. 3100

CELIA DIAMOND and WILLIAM DIAMOND, and BRIDGET McGRAIL and JOHN McGRAIL,
Appellants,

vs.

LAWRENCE F. CONNOLLY, Administrator of the Estate of John Corbett, Deceased, and LAWRENCE F. CONNOLLY, Individually, JOHN J. CONNOLLY and JOHN E. McBURNEY,
Appellees.

In Equity
Appeal from the District Court, District of Idaho, Northern Division.

BRIEF OF APPELLANTS.

CALEB JONES,
Counsel for Appellants.

McKEE PRINTING CO., SPOKANE.

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STATEMENT OF THE CASE.

The Bill of Complaint in this cause was filled on the 29th day of March, 1917, by Celia Diamond and William Diamond, her husband, and Bridget McGrail and John McGrail, her husband, residents and citizens of the state of Pennsylvania, as plaintiffs, against

Lawrence F. Connolly, indivdually and as administrator of the estate of John Corbett, deceased, and John J. Connolly and John E. McBurney, residents and citizens of the state of Idaho, defendants. The plaintiffs claim to be the heirs of said John Corbett, deceased, whose estate they alleged, was without their knowledge fraudulently distributed to the said Lawrence F. Connolly, John J. Connolly, William Connolly and Ellen Udell. The plaintiffs seek to charge said Lawrence F. Connolly, administrator of said estate, *as their trustee,* with responsibility for the entire estate; and John J. Connolly and John E. McBurney as sureties on said administrators' bond, with a liability up to the limit of the penalty of the bond; and the said Lawrence F. Connolly, individually, and John J. Connolly, as distributees, up to the amount of the estate received by each of them. It is alleged that the reason why the other two distributees are not made parties, is because they are not within the jurisdiction of the court. The facts upon which this action is predicated, are set forth in plaintiffs' complaint, a summary of which is as follows:

That Celia Diamond and William Diamond were married in the year 1889, and Bridget McGrail and John McGrail were married the same year, since which date all have been citizens and residents of the state of Pennsylvania. That in the year 1892 the said Bridget McGrail and John McGrail, her husband, became citizens of the United States, and in the year 1897, the said Celia Diamond and William Diamond,

her husband, became citizens of the United States. The two women are sisters and were born in Galway, Ireland, being the daughters of Austin Madden and Bridget Madden, his wife. The said John Corbett, their mother's half brother, died January 30, 1907, in Kootenai County, Idaho, leaving an estate therein. In the month of February, 1907, on his own petition, the defendant Lawrence F. Connolly, was appointed as administrator of the estate of said John Corbett, deceased, by the Probate Court of Kootenai County, Idaho, and qualified by giving the required bond, signed by John J. Connolly and John E. McBurney, as sureties, and thereupon entered upon the discharge of his duties. That on the 4th day of March, 1907, the said defendant Lawrence F. Connolly, as administrator of said estate, filed an inventory and appraisement in said Probate Court, showing said estate to be comprised of personal property, other than cash, all valued at $21,356.98, which, is alleged to be grossly disproportionate to its real value. That the plaintiffs Celia Diamond and Bridget McGrail are the neices of the said John Corbett, deceased, and were at the time of his death and are now his true and lawful heirs, and as such entitled to his said estate.

> "That at the time that the defendant, Lawrence F. Connolly, presented to the Probate Court of Kootenai County, State of Idaho, his petition for letters of administration on the estate of the said John Corbett, deceased, he represented to the said court, that William Connolly, John J. Connolly and himself were brothers, and that Ellen Udell was their sister, and that they all were cousins of said John Corbett, deceased, and his heirs at law,

at the time knowing that they were not the next of kin or his heirs at law. That said representations were made with intent to deceive said Probate Court, and to defraud these plaintiffs."

"That on the 2nd day of August, 1909, said Lawrence F. Connolly, as the administrator of the estate of said John Corbett, deceased, filed a petition in said Probate Court of Kootenai County, Idaho, asking for a decree of distribution of said estate, therein falsely representing to said court, that he, his brothers William Connolly and John J. Connolly and his sister Ellen Udell, were the heirs at law of said John Corbett, deceased, that said representations were made by the said Lawrence F. Connolly, with the knowledge and assent of his brothers and sister, and with intent to deceive said Probate Court, and to defraud these plaintiffs as the heirs at law of the said John Corbett, deceased, by taking unto themselves the said estate, that in law, equity and right belonged to these plaintiffs."

"That on the 23rd day of August, 1909, the said Probate Court of Kootenai County, Idaho, in compliance with the petition mentioned in the last preceding paragraph hereof, and by reason of said false and fraudulent representations in said petition made, made a decree of distribution to the said Lawrence F. Connolly, William Connolly, John J. Connolly and Ellen Udell, in equal portions, what was represented to be the entire estate of said John Corbett, deceased, consisting as stated in said decree of distribution of $19,-915.38, cash, lawful money of the United States of America."

"That thereafter on the 28th day of June, 1912, the said Lawrence F. Connolly, as the administrator of the estate of the said John Corbett, deceased, distributed and delivered said estate to himself, and John J. Connolly, on the 28th of

June, 1912, and to William Connolly and Ellen Udell, on the 3rd day of July, 1912, in the proportions in said decree of distribution mentioned, with the full knowledge on the part of each and every one of them, that none of them were the next of kin living and residing in the United States of America, or the heirs at law of said John Corbett, deceased, or rightfully entitled to a share of said estate."

"That the plaintiffs Celia Diamond and Bridget McGrail, were both born near Clifden, Galway County, Ireland, and their both parents were up to the time of their respective deaths, residents and citizens of said County of Galway, and subjects of the United Kingdoms of Great Britain and Ireland. That their mother Bridget Madden was a half sister of the said John Corbett, deceased, who was also born near Clifden, County Galway, Ireland. That the parents of the defendants Lawrence F. Connolly, William Connolly, John J. Connolly and Ellen Udell, lived near Clifden, County Galway, Ireland, and said defendants were born there. That during the early lives of the plaintiffs, defendants and the said John Corbett, deceased, their respective families were well acquainted with one another. They frequently met in a social way, traded at the same market, knew where each other lived, and recognized each other as friends and relatives."

That ever since the plaintiffs came to the United States of America they have kept in touch with their relatives and friends at Clifden, County Galway, Ireland, and have made frequent visits there, so that their whereabouts in the United States became well known to the relatives and friends of the respective parties to this action residing there.

"That, on or about the month of May, 1910, after the said defendants Lawrence F. Connolly and John J. Connolly, and their brother William Connolly and their sister Ellen Udell, had concealed or not maded known the death of the said John Corbett, deceased, for a period of three years and three months, from his relatives and next of kin in Ireland, and from his other relatives and next of kin in the United States, and in about one year after they had procured a decree of distribution from the said probate court of his estate to themselves; the death of the said John Corbett, deceased, was first brought to the knowledge and attention of plaintiffs, by some neighbors, who brought to them and read an announcement in a newspaper of the death of said John Corbett, in Idaho. That plaintiffs immediately procured the assistance of a friend to write to their mother of the death of their uncle, the said John Corbett, each being illiterate and unable to write in person; believing at the time, that their mother was the sole heir of said John Corbett, and have at all times acted on such hypothesis since the death of the said John Corbett was maded known to them, until they were informed by Caleb Jones, that they were the heirs of said John Corbett, deceased, in their own right, and independent of that of their mother."

That soon after the death of the said John Corbett became known to the plaintiffs, they consulted one J. W. Davidson, an attorney and counselor at law, at Pittsburg, Pennsylvania, and was by him informed that they had no direct interest in the estate of John Corbett, deceased, and could have none until their mother's death, as she was the sole heir. That the defendant Lawrence F. Connolly, while acting as the

administrator of the estate of John Corbett, deceased, made a trip to Ireland, and by fraud and misrepresentation procured an assignment to himself of the right, title and interest of the said Bridget Madden, to said estate, dated April 1st, 1911. That thereafter in March, 1912, proceedings were commenced on behalf of the said Bridget Madden, in the United States Circuit Court, of Idaho, with the object of securing the estate of the said John Corbett, deceased, which proceedings were dismissed without prejudice; and on the 28th day of May, 1911, proceedings were instituted by the said Bridget Madden in the state courts of Idaho, with the object of enforcing her claim as the sole heir of the said John Corbett, deceased, the final determination thereof being in October, 1913. That the plaintiffs took great interest in the litigation instituted on the behalf of their mother, and did all in their power to further her interest. That pending the said litigation they were frequently informed by a number of attorneys and counselors at law, that their mother was the sole heir of John Corbett, deceased, and that they would have no direct interest in his estate until her death. That neither of the plaintiffs have acquired any of the elements of a school education, and cannot read or write. That they placed reliance and confidence in the representations made to them by the several attorneys that informed them that their mother was the sole heir of John Corbett, deceased, and that they could have no interest while she lived. In discussing this matter with friends and acquaintances who were intelligent

and possessed of a school education, and in whose ability and integrity they had respect and confidence, they were repeatedly told that they could have no interest in the Corbett estate while their mother lived, as she alone was the next of kin and entitled to the estate, and plaintiffs believed such statements in connection with and confirmatory of statements made by the several attorneys consulted.

That Bridget Madden, the mother of the plaintiffs, died on the 26th day of August, 1914, and it was a very short time previous to her death that the plaintiffs learned that the courts of Idaho had denied her any right or interest in the Corbett estate, when, they took the matter up with said J. W. Davidson, who told them, that, since the courts of Idaho had determined that their mother had no right, they could have no right. Not allowing the matter to rest here, we find that they consulted other attorneys, and the question of their right in the premises was further investigated, and the record shows that it was not until August, 1916, that they were made acquainted with the disposition of the Corbett estate, and tentatively informed that they were the heirs of the said John Corbett, deceased. The record shows, that, the plaintiffs were laboring under a mistake of their rights in the premises. That they were diligent and active, and were not negligent in looking after their own interest. That they used such precaution and took such steps, as fully comports with any reasonable degree of care and activity necessary to prevent

them becoming guilty of the charge of laches, or subject to the statute of limitations. They learned of John Corbett's death in May, 1910, and were first advised that they were his heirs in August, 1916. After such advice, plaintiffs show diligence in informing defendants of their cliam, and in further investigation, by consultation of distinguished attorneys, as to their rights in the premises, right up to the date of the commencement of this action. The plaintiffs have sought to set forth in detail a full and complete naration of the facts, events and circumstances, constituting the empediments to the earlier prosecution of this action in their complaint set forth. (See Transcript page 7-31.)

The several questions involved were raised in the trial court, on two several motions of the defendants, which are identical in their scope, and which were submitted, regarded and considered as one by the Court. The general sufficiency of the complaint is therein attacked, under which head, the trial court held paintiffs' allegations of fraud, insufficient; the bar of the statutes of Idaho regarding the conslusiveness of probate decrees and expiration of the time of appeal from such proceedings; the bar of the general statute of limitations, and the doctrine of laches were interposed by the defendants, and sustained by the court.

On additional question is presented, to wit; the ruling of the trial court in denying plaintiffs' motion for permission to amend their complaint.

SPECIFICATIONS OF ERROR.

First. The Court erred in dismissing plaintiffs' complaint, on the ground that it did not state facts sufficient to constitute a valid cause of action in equity, or entitle plaintiffs to the relief prayed for against each of the several defendants.

Second. The Court erred in denying plaintiffs' motion to amend their complaint, by striking out the words in line eight (8) and nine (9) of paragraph nineteen (XIX), to wit; "that said representations were made by the said Lawrence F. Connolly," and inserting in the place thereof the words, "at the time knowing that they were not the next of kin or heirs at law, or as such entitled to a distributive share of said estate; that said representations were made by the said Lawrence F. Connolly, while acting as administrator of said estate."

Third. The Court erred in dismissing plaintiffs' complaint on the ground, that, the cause of action therein set forth was barred by the provisions of Section 5627 or 5666, or Sub. Div. 7 of Section 4831, or of Section 4834, of the Code of Civil Procedure of the Idaho Revised Codes.

Fourth. The Court erred in dismissing plaintiffs' complaint on the ground that the cause of action therein set forth was barred by the provisions of Section 4052, or of Sub. Div. 4, or Section 4054, of the Code of Civil Procedure of the Idaho Revised Codes.

Fifth. The Court erred in dismissing plaintiffs' complaint on the ground that plaintiffs are barred from recovery by reason of their apparent laches.

Sixth. That the Court erred in sustaining defendants' motions to dismiss plaintiffs' complaint.

Seventh. That the Court erred in not denying defendants' motion to dismiss plaintiffs' complaint.

Eighth. The Court erred in the making and entry of that certain decree, absolutely dismissing plaintiffs' complaint in this action.

In the presentation of argument on the several errors complained of, counsel will endeavor to follow, as near as may be, the same order of discussion as adopted by the learned Judge of the trial court in his opinion (Transcript page 57-73) indicating the grounds of his decision. The question of plaintiffs' right of succession to the estate of the said John Corbett, deceased, was assumed but not decided by the trial Judge, so that in order to make the entire case more clear, counsel for appellants beg leave to mention the basis of their claim in this respect.

Early in the year 1907 John Corbett died in Idaho, intestate, leaving surviving him, his next of kin Bridget Madden, a half sister, who was at the time, a resident and subject of the United Kingdoms of Great Britain and Ireland. Under the rule of the common law, as stated by Chancellors Blackstone and

Kent, and as announced by the Supreme Court of the United States in the case of *Orr vs. Hodgson,* 4 Wheaton 453, aliens are not deemed to be heirs of deceased persons. This old rule of the common law has been narrowed to some extent in the state of Idaho as is disclosed by its Statutes of Succession, Sections 5700-5717, Idaho Revised Codes, though not entirely abrogated. Section 5715, provides as follows:

> "Resident aliens may take in all cases, by succession as citizens; and no person capable of succeeding under the provisions of this chapter is precluded from succession by reason of the alienage of any relative; but no non-resident foreigner can take, by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

Now under the provisions of this law, the Supreme Court of Idaho, held that Bridget Madden never had any interest in the estate of John Corbett, deceased, because of her failure to initiate a claim within five years after the death of the said John Corbett, her brother. See *Connolly vs. Reed,* 125 Pac. 217. That court in discussing the question said:

> "Our statute is not a recognition or extension of any previously existing right a non-resident alien had, but it is rather the fresh grant of a right, * * * which the state confers on aliens."

The use of the word STATE, makes very clear, that no right is traceable by reason of personal relationship of the decedent and alien, for the STATE

provides the method of the inception of the virgin right, in derogation of the common law. In the case of *Connolly vs. Probate Court,* 136 Pac. 205, the same court declared:

> "A non-resident alien cannot by failure to make application to succeed to an estate as provided by law, deprive resident heirs of a right to succeed thereto."

The state of Virginia had a very similar statute to that of Idaho, and the court in the case of *Jackson vs. Sanders,* 2 Leigh 109, in construing the statute, stated:

> "In Virginia, by statute, the course of decent is not interrupted by that of alienage of any of the lineal of collateral ancestor; and, therefore, if a citizen dies, leaving a brother who is a citizen, and a sister who is an alien, and the children of that sister who are citizens, and the brother sister, and children be all living, the children of the sister take by decent a moiety of the estate, and the brother takes the other moiety."

The term "heirs," means those entitled to succeed to the one dying intestate, and is not synonymous with the terms, "relative" or "kin." Under the Idaho statute the term "heirs" 'is used and applies only to the next of kin, being citizens and residents of the United States. That, therefore, the plaintiffs became the heirs of said John Corbett, deceased, by reason of their being the next of kin in, and residents and citizens of the United States.

On the question of succession the appellants and the trial court seem to be in accord. It is, however,

quite apparent that there is a very wide difference between the fundamental basis of construction, contended for by appellants and that assumed by the learned Judge of the trial court, on the other vital questions involved in this case, so that in prefacing the main argument on the errors complained of, it is well to distinguish plainly the difference.

Appellants contend that immediately on the appointment of Lawrence F. Connolly as the administrator of the estate of John Corbett, deceased, he then became the trustee of the heirs of the decedent, whether know to the court or known to him, whether present or absent, represented or not represented in court. In other words, that the relationship of trustee and *cestui que trust,* immediately arose between the administrator and the heirs at law of the said John Corbett, deceased. This relationship constitutes the basis of plaintiffs' action, and must be constantly kept in mind, and applied to all the vital questions involved in this cause.

The Supreme Court of Errors, of the state of Connecticut, in the case of the Appeal of O'Neil, 55 Conn. 409, 11 Atl. 857, held, that an administrator is a trustee of the heirs of the estate, and is liable for procuring an order of distribution knowingly ommitting the name of a distributee, and defines such act to be fraud.

The Supreme Court of the United States, in the case of *Michoud, e tal., vs. Girod,* 4 How. 503, II Law ed. 1100, said:

> "We say that an executor or administrator is, in equity, a trustee for the next of kin, legatees and creditors."

And in the case of *Johnson vs. Waters,* III U. S. 671, 28 Law ed. 558, said:

> "We therefore conclude that after a creditor of an estate has his claim duly acknowledged by an administrator, * * * That in principle, the administrator is the trustee and holds in possession for his benefit the property of the estate which is the common pledge of the creditors."

The trial Judge in his consideration of the case failed to consider any trust relationship, and has treated the plaintiff heirs and the defendant administrator of the estate of John Corbett, deceased, as adversaries, as parties dealing at arms length, and only individually and adversely to each other. This is evidenced not only by the reasoning of the court, but also by the fact, that in not one case cited, in support of the court's position, is the question of trustee and *cestui que trust* involved. As stated before, this trust relationship constitutes the very foundation of plaintiffs' cause, and is fundamental in its application to heirs and administrators where their interest may conflict. That in order to fairly construe plaintiffs' complaint, in order to properly consider plaintiffs' cause of action, in order to make proper application of the law and the authorities

presented in its support, it is essential to keep in mind the trust relationship of Lawrence F. Connolly to the plaintiffs in this action.

ARGUMENT.

The first assignment of error is as follows, to wit:

> "The Court erred in dismissing plaintiffs' complaint, on the ground that it did not state facts sufficient to constitute a valid cause of action in equity, or entitle plaintiffs to the relief prayed for against each of the several defendants."

Under this assignment of error, questioning the sufficiency of plaintiffs' complaint, the trial court, in his discussion of the question, layed down the following premise:

> "Assuming, without deciding, that plaintiffs were more closely related to the deceased than the distributees, and that, after their mother, they were next kin, and that by reason of their mother's alienage disqualifying her from inheriting they became the heirs at law of the deceased, not through their mother, but in their own right, are the facts exhibited by the bill otherwise sufficient to entitle them to relief."

and after observing the number of times that the defendant Lawrence F. Connolly had been drawn into court on charge of fraud, and the general legal proposition, that a decree of distribution is in the nature of a proceeding *in rem,* and when taken in compliance with the statute becomes final, and fore-

closes the rights of all parties, unless nullified by fraud, then proceeds to state:

> "But they say that the decree was procured by fraud. What are the facts disclosed by the pleadings in this respect, and can the decree be assailed on the account thereof? The averments are, that, with the knowledge and assent of his brothers and sister, the defendant Lawrence F. Connolly, with the intent to deceive the court and defraud the plaintiffs, falsely represented in his petition for distribution that he and his co-distributers were the heirs of the deceased, and the court acted upon such representations. There is a further statement to the effect that the distributees did not advise Corbett"s relatives of his death, until about a year after the distribution was made."

The trial Court is evidently in error in this last statement of fact, for none such appears in the bill of complaint. It is alleged, however, in paragraph XXVII (Transcript page 16) as follows, to wit:

> "That on or about the month of May, 1910, after the said defendants Lawrence F. Connolly and John J. Connolly, and their brother William Connolly and sister Ellen Udell, had concealed, or not made known the death of the said John Corbett, deceased, for a period of three years and three months, from his relatives and next of kin in Ireland, and from his other relatives and next of kin in the United States, and in about one year after they had procured a decree of distribution from the probate court of said estate to themselves; the death of said John Corbett, deceased, was first brought to the knowledge and attention of the plaintiffs by some neighbors, who brought to them and read an announcement in a newspaper of the death of John Corbett in Idaho."

The Court will observe that this allegation is subject to a very different construction, on the question of fraud, from the statement made by the trial court. But, even with this correction, the allegation of the complaint, appellants contend, is fairly subject to a much broader statement of fact, concerning the question of fraud. To the averments cited by the trial court should be added the averment found in paragraph XVIII of the bill of complaint, (Transcript page 12) as to the knowledge of the defendants that they were not the heirs of John Corbett, deceased, and the averments found in paragraph XXI of the bill of complaint (Transcript page 13) to the effect, that, Lawrence F. Connolly the administrator distributed and delivered the estate to himself and brothers and sister, "with full knowledge on the part of each and every of them, that none of them were the next of kin living and residing in the United States of America, or the heirs at law of said John Corbett, deceased," together with the all important averments of fact showing the trustee relationship existing between the said Lawrence F. Connolly as administrator and the plaintiffs as heirs of the estate of said John Corbett, deceased. The narrowness of the trial court's basis could not but result in a wrong conclusion.

Further quoting from the decision of the trial court:

> "There is no averment that Connolly either represented in the petition or testified before the court that the deceased left no relatives other than the distributees, or that he made any false statement or concealed the fact of the existence of

> the plaintiffs or their relationship to the deceased. The falsity, if any there was, consisted of the claim of representation that the Connollys were the only heirs * * * not even that they were the next of kin of the deceased. A claim or representation of heirship, manifestly involves mixed questions of law and fact."

It is a little difficult for appellants to understand why, when they allege, that, the defendant Lawrence F. Connolly, the petitioner, represented that he and his brothers and sister were the cousins and heirs at law of John Corbett, deceased, that it was not tantamount to an allegation, under the laws of Idaho, that they were the next of kin of the deceased. Section 5626 of the Revised Codes of Idaho provide in part:

> "Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto," etc.
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> Sec. 5701, Id. "The property both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of the administrator appointed by that court for the purpose of administration."
>
> Sec. 5702, Id. "When any person having title to an estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in these Codes, subject to the payment of his debts, in the following manner:

1. .....

2. .....

3. .....

4. .....

5. If the decedent leave neither issue, husband, wife, father, mother, brother nor sister, the estate must go to the next of kin in equal degree," etc.

So that, under the allegations of the complaint the heirs must be the next of kin, and when a cousin alleges that he is an heir at law, it must be understood that he alleges that he is the next of kin resident in the United States, or he could not be an heir at law. The falsity of the representations of Lawrence F. Connolly, that he and his brothers and sister were the only heirs of John Corbett, deceased, with full knowledge on his part that they were not, and while he was acting as administrator, i. e., trustee, of the plaintiff heirs at law, if admitted would seem to make out plaintiffs' case, especially when taken in connection with the following statement of the trial Court:

> "It is true that plaintiffs further aver that this representation was made by Connolly with the intent to deceive the court and to defraud the plaintiffs, but in the absence of averments of specific facts from which an inference of wicked intent may be drawn, this language must be held to mean nothing more than that the claim was made with the intent on the part of Connolly to induce the court to distribute the estate to him and his sister and brothers."

This meaning of the plaintiffs' allegations of the intent of Lawrence F. Connolly, when applied to him as trustee, or as administrator of said estate, is just what plaintiffs allege and contend for, and when this is conceded, it exhibits all the wickedness that could attach to the acts of any cheat or thief, for taking that, which he knew, in God's chancery belonged to someone else. In the case of *Claflin vs. Ins. Co.,* 110 U. S. 95, 28 Law ed. 82, Justice Matthews in speaking for the Court said:

> " 'Fraud,' said Justice Carton, in *Lord vs. Goddard,* 13 How. 198, 'means intention to deceive.' 'Where one' said Shipley, Ch. J., in *Hammat vs. Emerson,* 27 Me. 308-326' 'has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive.' If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud."

Further quoting from the trial Court's decision:

> "There is no charge that he misrepresented any material fact to the court, or wilfully withheld any information, or resorted to any trick or devise, or did anything or left anything undone which it was his duty to do, for the purpose of preventing the plaintiffs from having their day in court or fully and fairly presenting their claims for adjudication."

These two last quotations from the trial Court's decision, illustrate his absolute disregard of the salient point or basis of plaintiffs contention; that his, the relationship of trustee and *cestui que trust,* at the time existing between the plaintiffs and the said Lawrence F. Connolly, defendant. It must be conceded that the

allegations of fact sufficient to show fraud between a trustee and his *cestui que trust,* are entirely different in their scope, from those required to show fraud between adversary parties dealing at arms length. Think of the trial Court saying, "that it is not shown that Lawrence F. Connolly, did anything or left anything undone which it was his duty to do." Apply this statement to the trustee, under the allegations of plaintiffs' bill of complaint, where the trustee or administrator represented that he and his co-conspirators, were the heirs and entitled to the estate as such, at the same time knowing that they were not, and taking unto himself the property rightfully under the law belonging to the people, that the law directed he should represent, thus deceiving the court, thwarting the operation of the law, and cheating and robbing those entitled to its protection. Is this not a violation of the duty of an administrator? or was it his right as an administrator, not to represent the heirs of an estate when in conflict with his own personal interest, and leave them unrepresented, or knowingly misrepresent them in probate proceedings, and thus construe such actions as a license predatory of his official trust. Is it a violation of the duty of a trustee to knowingly give away the substance of his *cestui que trust,* or is it to be deemed in this case, one of the virtues that bears not the mark of fraud, violation of trust, or neglect or disregard of duty, and which has become sanctified by time?

The measure of duty, accountability, and right of an administrator, plaintiffs contend, are entirely different from that of an individual dealing with an estate in probate, and in the humble judgment of counsel for appellants, the trial Court failed to appreciate the application of this broad and well recognized principle. It becomes most painfully and plainly apparent, when reading the trial Court's decision, where reference is made to the Idaho cases of *Connolly vs. Reed,* 125 Pac. 213, and *Connolly vs. Probate Court,* 136 Pac. 205, wherein it is stated, "The allegations of fraud were substantially the same as they are here," thereby measuring the sufficiency of plaintiffs' allegations of fraud, by the same formula of words as was used by the Supreme Court of Idaho in the said cases, when it should have been kept in mind that the relationship of the parties in this action are entirely different. I would respectfully ask this Court to take into consideration the respective positions of the parties plaintiff and defendant, in the case at bar and the Idaho cases referred to. In the cases of Connolly vs. Reed and Connolly vs. Probate Court, *supra,* the Supreme Court of Idaho held, that Bridget Madden, had no right, title or interest, in the subject matter of the action. That she was not an heir of John Corbett, deceased. There was not therefore any trust relationship between her and the administrator Connolly. Taking into consideration this one distinguishing feature, the Court's holding that Bridget Madden's allegations concerning the fraudulent appropriation of the Corbett estate by Lawrence F. Con-

nolly, was insufficient, is reasonable and just on the premises therein assumed, but does not apply to the case at bar. There was no fraud alleged in either of the cases that could effect Bridget Madden or the party raising the question, by reason of her lack of material interest in the subject matter of litigation. I cannot comprehend that it was the intention of the Supreme Court of Idaho, to hold, that the words there used were insufficient to constitute fraud, whatever the relation of the parties to the cause.

"The common law asserts as a general principle that there shall be no definition of fraud." 2 Pars. Contr. 769.

> "The courts have never laid down as a general proposition what shall constitute fraud, or any rule, beyond which they will go, lest other means of avoiding equity should be found." I Story Eq. Sec. 186.
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> "In the sense of a court of equity, fraud properly includes all acts, omissions, concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." I Story Eq. Sec. 187.
>
> "Fraud consists in the supression of the truth * * * *suppressio veri,* or in the assertion of what is false * * * *suggestio falsi.*"

Examining the relationship of the parties in the case at bar, we find that even the trial Court concedes in his premise, on this question, that plaintiffs are the heirs at law of John Corbett, deceased; that Connolly,

the administrator of his said estate, falsely represented that he and his brothers and sister were the heirs of said deceased, knowing at the time that they were not; that they made such representations with intent to deceive the Probate Court and to defraud the plaintiffs, and with intent on his part to induce the Probate Court to distribute the said estate to him. It will thus be seen that the subject matter of this action is the estate of John Corbett, deceased, that the plaintiffs by reason of the heirship became parties in interest, and the relationship of trust between Lawrence F. Connolly, the administrator of said estate and plaintiff heirs becomes established; so that when plaintiffs allege, as in their proposed amended paragraph XIX, to wit:

> "That on the second day of August, 1910, saaid Lawrence F. Connolly, as the administrator of the estate of John Corbett, deceased, filed a petition in the said Probate Court of Kootenai County, Idaho, asking for a decree of distribution of said estate, therein falsely representing to said court, that he, his brothers William Connolly and John J. Connolly, and his sister Ellen Udell, were the heirs at law of the said John Corbett, deceased, at the time knowing that they were not the next of kin or his heirs at law, or as such entitled to a distributive share of said estate; that said representations were made by said Lawrence F. Connolly, while acting as the administrator of said estate, with the knowledge and assent of his brothers and sister, and with intent to deceive said Probate Court, and to defraud these plaintiffs as the heirs at law of said John Corbett, deceased, by taking unto themselves the said estate, that in law, equity and right belonged to these plaintiffs."

they allege every essential element of fraud in this one short paragraph; but, on the other hand, if the same allegations were made by Bridget Madden, regarding the misappropriation of said property, she not being an heir or party in interest, it would not be sufficient. The trial Court's speculation as to what the Probate Court Might have done, had all the facts of kinship here exhibited been presented to it, is beside the question. Every proposition presented to our courts, might be dispensed with on the same basis, and the matter be presented in the first instance to some speculator on the past and future actions of men. Relationship of Parties

See, Pomeroy's Eq. Jur. Sec. 958, 3rd Ed.

ASSIGNMENT OF ERROR NO. 2.

> "The court erred in denying plaintiffs' motion to amend their complaint, by striking out the words in lines eight (8) and nine (9) of paragraph nineteen (19), to wit; "that said representations were made by the said Lawrence F. Connolly," and inserting in the place thereof the words, "at the time knowing that they were not the next of kin or his heirs at law, or as such entitled to a distributive share of said estate; that said representations were made by the said Lawrence F. Connolly, while acting as administrator of said estate."

Plaintiffs admit that the allegations of said paragraph nineteen (XIX) of their bill of complaint, (Transcript page 12) when considered separately from the remainder of the complaint are not as specific as a narrow construction might require, and

therefore moved the court for permission to amend. It is too plain for argument, that, if the allegations of this paragraph were too meagre or not sufficiently specific, it was error to deny the plaintiffs the privilege of amending. This privilege was denied evidently on the theory, that it would not make any difference in the final conclusion of the trial court, to which ruling the plaintiffs excepted and still except The attitude of the trial court in this matter will become more apparent in appellants' discussion of error numbered three, which constitutes a phase of the general question of fraud and conclusiveness of probate proceedings.

ASSIGNMENT OF ERROR NO. 3.

> "The Court erred in dismissing plaintiffs' complaint on the ground that the cause of action therein set forth was barred by the provisions of Sections 5627 or 5666, or Sub. Div. 7 of Section 4831, or of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes."

The sections of law above referred to, are as follows, to wit:

> "Sec. 5627. WHAT THE DECREE MUST CONTAIN: In the order or decree the court must name the person and proportions or parts to which each shall be entitled, and such persons may demand and sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legattees or devisees, subject only to be reversed, set aside, or modified on appeal."

Sec. 5666. "TIME OF APPEAL TO BE TAKEN: The appeal must be taken within sixty days after the order, decree, or judgment is entered."

Sec. 4831. "WHEN MAY BE TAKEN: An appeal may be taken to the district court of the county from a judgment or order of the probate court in probate matters:

1. Granting, refusing or revoking letters testamentary, or of administration, or of guardianship;

2. Admitting, or refusing to admit, a will to probate;

3. Against or in favor of the validity of a will, or revoking the probate thereof;

4. Against or in favor of setting apart property, or making an allowance for a widow or child;

5. Against or in favor directing the partition, sale, or conveyance of real property;

6. Settling an account of an executor, or administrator, or guardian;

7. Refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share;

8. Confirming the report of appraiser setting apart the homestead.

Sec. 4834. "An appeal from the probate court in probate matters is taken by filing with the clerk of the probate court in which the judgment or order appealed from is made or entered, a notice stating the appeal from the same or some specific part thereof and serving a similar notice on the administrator, administratrix, executor or executrix (unless they be the appellants) and

upon all other parties interested who appeared upon the motion or proceeding which the appellant desires to have reviewed or upon their attorneys. The notice of appeal must be filed and served within sixty days after the order, decree or judgment is entered. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within ten days after the service of the notice of appeal an undertaking be filed or a deposit of money be made with the clerk as hereinafter provided, or the undertaking be waived by the adverse party in writing."

The trial Court in his introduction of the question in relation to these statutes, says:

"But even if it were shown that the Connollys wilfully set forth in the petition for distribution material facts in respect to their relations to the deceased which they knew to be untrue, for the purpose of securing a decree in their favor, I would still be inclined to regard the bill as insufficient. It must be borne in mind that there is no suggestion of extrinsic fraud, * * * nor did he fail to discharge any duty which he owed them. The full extent of his wrong doing, if any there was, consisted in making a contention in open court that he and his brothers and sister were the heirs. Suppose he had gone further and upon the hearing had falsely testified that the deceased left no other relatives at all, * * * at most we would have a case of instrinsic fraud. And, indeed, that only instrinsic fraud is intended to be charged in the bill is, as I understand, admitted by counsel for the plaintiffs."

Counsel for plaintiffs and appellants much regret the misunderstanding of the trial Court of the position assumed by him on this phase of the question of fraud. It was never the intention of counsel to ad-

mit that only intrinsic fraud was intended to be charged. The foregoing quotation but illustrates the different premises assumed by the Court and counsel for appellants. The Court fails to recognize the trust relationship alleged and existing between Lawrence F. Connolly and the plaintiffs in this cause, and reasons from a basis of individuals dealing with each other at arms length, while counsel for appellants contend that the appointment of Lawrence F. Connolly as administrator of John Corbett, deceased, created a trust relationship between him and the heirs of that estate, thereby estopping him from dealing as an individual with the affairs of that estate. Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, could not contract with Lawrence F. Connolly, individually, or in any other manner deal with himself in a representative capacity, for he could not at the same time represent himself and his *cestui que trust,* in any court where their interest was adverse, whether in the obtaining of a decree of distribution, or in any other matter where the law assumes an adversary condition to exist. It was held by Justice Field in the Supreme Court of the United States, in the case of *Bryan vs. Kales,* 134 U. S. 126-136, 33 Law ed. 833, that,

> "A judgment recovered by an individual against himself as an administrator is an absolute nullity."

In the recent case of *Simon vs. Southern R. Co.,* 236 U. S. 126-128, 59 Law ed. 499, the Court in dis-

cussing the case of *Marshall vs. Holmes,* 141 U. S. 597, 35 Law ed. 870, and to which this court's attention is respectfully called, stated:

> "The ground of decision in the Marshall case, * * * is, that while Sec. 720 prohibits the United States Courts from staying proceedings in a state court, it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor prevent federal courts from enjoining a party from using that which he calls a judgment, but which is, in fact and in law, a mere nullity."

Plaintiffs contend that the decree of distribution obtained by the said Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, distributing to himself and his co-conspirators, is in fact and in law, an absolute nullity. But, assuming a less radical position, on taking into consideration the action of Lawrence F. Connolly in having the estate distributed to himself and his co-conspirators, when viewed in the light of the trust relationship existing between himself and the plaintiffs, constitutes actionable fraud, and affords the same ground for setting aside judgments and decrees, or the nullifying the effect thereof and taking from the guilty party the fruits of his own wrong, as is found in almost all the adjudicated cases on the subject from time immemorial, whether it be called extrinsic fraud, or otherwise denominated. In the case of the *United States vs. Throckmorton,* 98 U. S. 61-71, 25 Law ed. 93, the Court said:

> "The frauds for which a bill in chancery will be sustained, to set aside a judgment or decree,

> between the same parties, rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court and not a fraud which was in issue in the first suit."

Was the trust relationship existing between Lawrence F. Connolly and these plaintiffs in issue in the probate proceedings in which he secured a decree of distribution to himself of the property of his *cestui que trust?* It seems to me that there can be but on answer, and that in the negative. The trustee and himself individually could not be adversary parties. In the case of *Sohler vs. Sohler,* (Cal.) 67 Pac. 282, 285, it was held, that, the failure of the executrix of a will and the natural guardian of her children, even without personal adverse interest, to not represent them in an adversary capacity, against a know fraudulent claimant, in proceedings for the distribution of an estate, "was fraud extrinsic of the case." If the construction placed by the trial Court upon the cited statutes of Idaho, under the facts of this case, is to be maintained, then, it becomes possible for an administrator of an estate to secure a decree to himself of the estate of a deceased person, regardless of the laws of succession, at the time knowing that he is not an heir, and knowing who the rightful heirs are; and if he is able to keep the matter concealed for the short space of sixty days from its entry, his decree becomes conclusive against all the world, whether minors, people of unsound mind, or others laboring under any disqualification whatsoever. In the case

at bar, the decree of distribution was made and entered and became conclusive, under the trial Court's construction, more than one year before the plaintiffs had any knowledge of even the death of the decedent, and while being, under the law, represented by a trustee who knowingly misappropriated it. Sec. 5626, Revised Codes of Idaho, provides:

> "Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto."

Sec. 5627 Id. provides:

> "In the order of the decree the court must name the persons and the proportions or parts of which each shall be entitled," etc.,

and makes such decree conclusive.

These statutes show the duty of the Probate Court, and the parties who are entitled to petition for a decree of distribution. Under their provisions Lawrence F. Connolly, would not, in his individual capacity have been qualified to have petitioned the Probate Court for a decree of distribution of the residue of said estate, nor would the court have had jurisdiction to have entertained such a petition. He was forced to do it in his representative capacity and as an officer of the court, and to hold that an officer can legally, knowingly and purposely misinform the

court, thus causing a misperformance, or a non-performance of the plain statutory duty of the court, would be contrary to all law and precedent, for such action on the part of the administrator could only result in nullifying the entire proceedings. The plain duty of the court, in this cause, was never performed at all, owing to the fraud of its own officer. It was a fraud on the parties who by law were entitled to the estate, it was a fraud on the court, it was the fraud of their representative for his own individual benefit. It is a judgment recovered by an individual against himself as administrator, and is therefore an absolute nullity.

The cases cited by the trial Court on the question are not in point. The case of Stead vs. Curtis, 191 Fed. 529, was an attempt at a re-litigation of the same issues between adversary parties, personally represented in a former action, where there was no question of trust relationship involved, and is therefore no applicable to the main points involved in the case at bar. The same remark holds good as to the case of United States vs. Throckmorton, 98 U. S. 61; nor is the relationship of trustee and *cestui que trust* involved in the case of Mulcahey vs. Dow, (Cal.) 63 Pac. 158, or the case of Lnch vs. Rooney, (Cal.) 44 Pac. 565, or Pico vs. Cohn, (Cal.) 25 Pac. 970, or William Hill Co. vs. Lawler, (Cal.) 48 Pac. 323. None of these cases are therefore in point, but the case of Goodrich vs. Ferris, 145 Fed. 844, and the California cases of Sohler vs. Sohler, 67 Uac. 282

and Bacon vs. Bacon, 89 Pac. 317, support the position taken by counsel for appellants, that is, that judgments and decrees may be set aside for fraud, and that a statute that makes a decree of distribution final and conclusive does not apply to cases like the one at bar, whether on the theory that courts have authority to set aside judgments and decrees for extrinsic fraud, or on their authority to deprive the wrong doer of the fruits of the judgment obtained by fraud, without directly setting aside the same. In support of appellants' position on this point, attention is respectfully called to the following authorities:

"Courts of equity have jurisdiction in cases where the next of kin is suing the administrator and his sureties, to recover the complainant's share of decedent's estate." Sec. 9 b. and Sec. II, Foster Federal Practice, 4th Ed.; *Payne vs. Hook,* 7 Wall. 425; *Pratt vs. Northam,* 5 Mason 95.

"A Bill to set aside a judgment of a state court will be entertained in a federal court." Foster Federal Practice, Sec. 358 (4th Ed.); *Gaines vs. Fuentes,* 92 U. S. 10; *Barroa vs. Hutton,* 99 U. S. 80.

"If through fraud or perjury an heir has been deprived of property, he has his remedy in a court of equity." *Connolly vs. Probate Court,* 25 Idaho 35, 136 Pac. 205.

"If the administration has been completed and the property passed out of the control of the Probate Courts, the Federal Courts can avail themselves of their jurisdiction in law or equity, in reference thereto." *Hale vs. Coffin,* 114 Fed. 575; *Herron vs. Comstock,* 71 C. C. A. 466, 139 Fed. 378; *Hayes vs. Pratt,* 147 U. S. 570; *Spencer vs. Watson,* 94 C. C. A. 659, 169 Fed. 379.

"So an heir may establish his right to a distributive share of an estate." *Byers vs. McAuley,* 149 U. S. 620; *Payne vs. Hook,* 7 Wall. 425; *O'Callahan vs. O'Brien,* 116 Fed. 934; *Rich vs. Bray,* 37 Fed. 273.

"A court of equity will take jurisdiction of a suit by a non-resident to set aside a decree of the Probate Court for fraud." *Arrowsmith vs. Gleason,* 129 U. S. 99-100; *Johnson vs. Waters,* III U. S. 668-675; *Payne vs. Hook,* 7 Wall 425.

"A court of equity has the right where other jurisdictional facts are present, without directly setting aside the proceedings in a state court, to lay its hands upon the guilty parties committing the fraud, and to hold them as trustees, for the defrauded one, to account for the proceeds of their action conceived and carried on in fraud." *Rhino vs. Emery,* C. C. A. 72 Fed. 382.

"We may concede that upon the allegations of the bill in this case the court below had no authority to set aside the decree of the Superior Court of Los Angeles County in admitting the will to probate and distributing the estate, and such is not the object of the bill. It is to declare the appellee a trustee of the property which he has inequitably obtained, and its jurisdiction to do so rests upon principles as old as equity itself." *Patterson vs. Dickson,* 193 Fed. 333.

"The most solemn transactions and judgments, may at the instance of the parties, be set aside and rendered inoperative for fraud * * * The courts of Chancery are always open to hear complaints against it, whether committed *in pais* or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or error of proceedings in another court, but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining judgment

or decree, it will deprive them of the benefit of it, and of any inequitable advantage that they have derived under it." *Johnson vs. Waters,* III U. S. 640.

"While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this court show that the proper Circuit Courts of the United States may, without controling, supervising, or annulling the proceedings of state courts, give such relief in cases like the one before us, as is consistent with the principles of equity." *Arrowsmith vs. Gleason,* 129 U. S. 86-101.

"If the court finds that the parties have been guilty of fraud in obtaining a judgment * * * it will deprive them of the benefit of it." *Simon vs. Southern Railway Co.,* 236 U. S. 118-120.

Equity acts upon the person, so that the real object of this action is not necessarily, to set aside the decree of the Probate Court, but, as was said by this Court in the case of Patterson vs. Dickinson, *Supra,* "it is to declare the appellee a trustee of the property which he has inequitably obtained," and to simply do this, it is difficult to understand how, on recognizing the Probate proceedings as one *in rem,* that an action in personam, between some of the same parties, would necessarily call in question, the power or authority of the Probate Court to distribute the estate of said John Corbett, deceased, when the real question is the rights of the defendants to retain the fruits of their fraud. It must be manifest that such a question could arise without involving the validity of the decree of the Probate Court. To these plaintiffs, it is not fair or just for the decree in said proceedings

in rem to be effective and regarded as an action in personam. In the one jurisdiction is acquired by the possession of the thing, and the giving of general notice, while in the other personal service alone will serve to give jurisdiction to bind the individuals, unless the doctrine announced in the case of Pennoyer vs. Neff, 95 U. S. 714, is now relegated to the forgotten past. The grievance complained of in this action in personam, was not adjudicated in the proceeding *in rem,* in the Probate Court. The gravamen of this action "is to declare the appellees the trustees of the property that they have inequitably obtained."

ASSIGNMENT OF ERROR NO. 4.

> "The Court erred in dismissing plaintiffs' complaint on the ground that the cause of action therein set forth was barred by the provisions of Section 4052 of Sub. Div. 4 of Section 4054, of the Code of Civil Procedure of the Idaho Revised Codes."

The sections of the Idaho statutes referred to in the above assignment of error, are a part of the general statutes of limitation for the commencement of actions, see Sections 4030-4080, and are as follows, to wit:

> "Section 4052. Within five years: An action upon any contract, obligation, or liability founded upon an instrument in writing."
>
> "Section 4054. Within three years:
>
> "1. An action upon a liability created by statute, other than a penalty or forfeiture;

"2. An action for trespass upon real property;

"3. An action for taking, detaining, or injuring any goods or chattles, including actions for specific recovery of personal property;

"4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Appellants desire to discuss the questions involved in this assignment of error, under sub heads, as follows, to wit:

Disability of plaintiffs to bring an action.

Statute not to apply until the discovery of the fraud.

Statute not to apply until the discovery of the mistake.

State statutes not applicable to cases of exclusive equity jurisdiction.

State statutes not applicable to trusts.

DISABILITY OF PLAINTIFFS TO BRING AN ACTION.

Section 4070 of the Revised Codes of Idaho is as follows:

"If a person entitled to bring an action, other than for the recovery of real property, be, at the time the cause of action accrued, either:

1. Within the age of majority; or
2. Insane; or
3. Imprisoned on a criminal charge, or in

execution under the sentence of a criminal court for a term less than life; or

4. A married woman, and her husband be a necessary party with her in commencing such action:

The time of such disability is not a part of the time limited for the commencement of the action."

Plaintiffs' complaint shows that John Corbett died January 30, 1907. That letters of administration of his estate issued to Lawrence F. Connolly, February 20, 1907. That a decree of distribution of said estate was entered August 23, 1909, and the estate was actually distributed on the 28th day of June and the 3rd day of July, 1912. The plaintiffs in this action are married women and have been since 1889. In Foster Federal Practice, Sec. 28 (4th Ed.) it is stated:

"General rule as to persons capable of being plaintiffs. All persons may file a bill in equity in their own right, except alien enemies, infants, idiots, lunatics, married women, and possibly those who by the laws of the state have been civilly dead."

In this case it must be evident to this Court that the plaintiffs have been laboring under the statutory disability of married women.

"In suits by married women, the husband must join in all cases, unless their interest are antagonistic, or he refuses to join, then he must be made a defendant; and in such cases the wife must sue by the next friend. Equity Rule 87; *Duglas vs. Butler,* 6 Fed. 228; *Taylor vs. Holmes,* 14 Fed. 498; *United States vs. Pratt Coal & Coke*

> *Co.,* 18 Fed. 708. This rule must be observed, as federal courts will not follow state practice or state statutes creating a different rule in equity suits. *Wills vs. Pauly,* 51 Fed. 257; *United States vs. Pratt Coal & Coke Co., supra.* But they do follow state practice on the law side. *Texas & P .R. Co. vs. Humble,* 36 C. C. A. 8, I U. S. App. 270, 50 Fed. 141; *Mehroff vs. Mehroff,* 25 Fed. 13." A Federal Equity Suit (Simkins) 3rd Ed. page 240.

The trial Court in discussing the question of limitation and disability of the plaintiffs to bring their action, said:

> "In reason I think that the better rule would be to regard the statute as absolutely binding in the premises. It is admittedly fair and reasonable, and it would tend to bring discredit upon upon the administration of the law, if, by reason of mere accident of residence, as a consequence of which plaintiffs are entitled to invoke the jurisdiction of this court, they could recover in a case where the citizens of the state, with like claims, would be debarred from recovering."

It seems that the trial Court in this statement betrayed an inclination to enforce the statute of limitations insofar only as it could be applied against the plaintiffs, without fear of bringing "discredit upon the administration of the law"; and confined his apprehension of such "discredit" to the enforcement of that particular provision favorable to plaintiffs. It might be well to suggest that the jurisdiction of courts of the United States over individuals, is largely owing to "the mere accident of residence," and that "mere accident of residence" inhibits under our national con-

stitution the citizens of the same state from invoking their jurisdiction. To deny residents and citizens of different states the right and privileges of Court of the United States, and the advantages of their own peculiar administration of the law, is to deny them a constitutional right. Payne vs. Hook, 7 Wall, 425; and to so construe a state law, as did the trial Court, would be to admit at once that Equity Courts of the United States are subject to such restraint as might be imposed by state legislation. To disregard this provision of the Idaho statute, relating to the disability of married women, especially when it is in harmony with the Equity Rules of United States Courts, and refuse its application in this case, simply means its judicial repeal, and the arbitrary disregard of Equity Rules. There is infinitely more danger of bringing "discredit upon the administration of law," by courts assuming legislative functions and refusing to enforce the law as understood, because of some imiginary inequality in its application, than there is in carrying the legislature's acts into effect, when its scope is recognized as being within the constitutional limits. The trial Court's reasoning on this subject could more appropriately be applied to the disability of the criminal, perchance of another state, suffering the result of his own wrongs, because his crimes enable him to invoke a provision of the self same statute, that the good, law abiding, and tax paying citizens are not able to take advantage of, thus putting a sort of premium on crime. Yet, appellants question the authority of the trial Court to eliminate this pro-

vision of Section 4070 *supra,* regardless of any apprehension that may be entertained concerning the "discredit" that its impartial enforcement might bring "upon the administration of the law." Appellants likewise question the trial Court's authority to repeal the provision providing for the disability of married women, and insist on the fairness of its application. If a court could on the grounds of equality of right. between men and women anad citizens of different states, disregard the plain Rules of Equity Practice, and also repeal the plain statutory provisions of a state, in order to enforce some ideal doctrine of equality, stability of the law and the rules of practice would be a thing of the past. On the same grounds might be repealed Section 5356, Idaho Revised Codes, which provide,

> "A married woman must not be appointed administratrix. When an unmarried woman appointed admnistratrix marries, her authority is extinguished."

It would seem on a second thought, that the end of such judicial repeal, even in the state of Idaho where the gentle sex have such extended rights, would be almost limitless.

STATUTE NOT TO APPLY UNTIL THE DISCOVERY OF THE FRAUD.

If the section of the statute of limitation, providing for the disability of married women, is to be disregarded and not applied in this case, the appellants say, and as seriously contend, that the very section of the statute invoked by the defendants, on the question of fraud, does not apply to this case, by reason of its own provisions. Sub. Div. 4 of Section 4054 of the Revised Codes of Idaho, provide,

> "An action for relief on the grounds of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggreived party, of the facts constituting the fraud or mistake."

The question then is, when did plaintiffs discover the fraud or mistake? or fraud and mistake? The allegations of the complaint must be taken as true in the consideration of this question, and the answer there found must be determinative of the question. It is manifestly unjust to answer this on any assumption by the Court when in direct contradiction to the plain allegations of the complaint, as did the trial Court in this cause, as is shown by the following extract from his decision:

> "The plaintiffs admit that they learned of the death of John Corbett at least as early as May, 1910, and thereupon consulted a lawyer touching their heirship. They allege that on March 14, 1912, their mother instituted an action to establish her claim to heirship, and later commenced other proceedings to the same end, and in all

> such litigation they did 'all in their power to further the interest of their mother.' It must therefore be assumed that at least as early as March, 1912, more than five years before the commencement of this action, they had knowledge of the Connollys representations in the Probate Court, which they now charge to be false and fraudulent." (Transcript page 68.)

The violence of this assumption, under the peculiar circumstances of this cause is certainly most extraordinary. Would the learning in May, 1910, of their uncle John Corbett's death, even put them on inquiry of any fraud perpertrated upon them, when they were laboring under the mistaken idea that their mother was the sole heir of her brother? Would the fact that they knew that their mother had commenced a suit in Idaho in March, 1912, coupled with the fact that they did "all in their power to further the interest of their mother," put them on inquiry as to a fraud perpertrated against them, when they were laboring under the mistaken idea that their mother was the sole heir of her brother John Corbett, deceased, and that they had no personal interest in the estate of their uncle while their mother lived? Consider the fact, that it is alleged that men learned in the law in whom they had respect and confidence, impressed on the minds of these poor illiterate women, the correctness of their preconceived ideas of their mothers' rights to her brother's estate, he having died intestate. And is it to be presumed by the Court that these poor illiterate women, living with their families nearly three thousand miles from the Probate Court

of Kootenai County, Idaho, under the extraordinary circumstances of this case, were familiar with the details of the administration of the estate of John Corbett, deceased or deemed to have sufficient notice to place them on inquiry, in the absence of any knowledge on their part that they were in their own right the heirs of John Corbett, deceased. If they had no interest in the estate as they mistakenly supposed, no fraud perpertated by the administrator, however wicked his intention, whatever his knowledge, and however subject to condemnation, whether "extrinsic or collateral" or otherwise, would not be fraud upon any parties without interest. Here is a plain mistake, on the part of the plaintiffs, is it to be recognized as such under the statute of Idaho? or is this cornerstone of plaintiffs' bill of complaint, presenting the question, to be substituted by assumption as if no such question was presented, and unceremoniously disregarded in the interest of the defendants? To assume that plaintiffs knew their interest or their rights in the premises in 1910 or in 1912, despite their allegations to the contrary, is as violent as to assume a solecism in nature. Is the Court to assume that the plaintiffs were different in 1910 or 1912 to what they are now in respect to their financial interests? Is the Court justified in the assumption that these plaintiffs are different from the common bulk of mankind, and not subject to probably the most impelling force of humanity, that of selfishness? Is is even reasonable to assume that the plaintiffs knew of many thousand dollars that awaited them in Idaho, and

would have come to their use and enjoyment, on their simply filing a claim therefore? The very idea is preposterous, and is not justified in law, much less in fact. Contrast such action with their action after the discovery of the fraud and mistake. Every allegation of the complaint show their activity, shows that they were laboring under a mistake, shows their lack of knowledge of the details and facts constituting the fraud of Connolly upon them, and the practical impossibility, even with reasonable diligence to comprehend the fraud perpertrated upon them, before being informed of their rights in the premises. If, however, plaintiffs' bill of complaint is to answer the question of the time of discovery of the fraud or mistake, then let the alleged facts speak.

John Corbett died January 30, 1907, intestate, leaving an alien sister in Ireland and the plaintiffs, neices, citizens and residents of the United States. That February 9, 1907, Lawrence F. Connolly filed a petition in the Probate Court of Kootenai County, Idaho, representing himself and his brothers and sister as the cousins of said John Corbett, deceased, and his heirs at law, at the time knowing that they were not the next of kin or his heirs at law. That on the 20th of February, 1907, he was appointed administrator of the estate of the said John Corbett, deceased, and on the same day qualified by giving a bond for the faithful performance of his duties. That on March 4, 1907, he filed an inventory and appraisement of said estate, and on the 2nd day of

August, 1909, he filed a petition in said Probate Court for the final distribution of said estate, therein falsely representing that he and his brothers and sister were the heirs of said estate. That by reason of such representations the Probate Court directed the distribution of said estate to be made to said administrator and his brothers and sister. That for some reason or other the distribution was not actually made until the 28th day of June and the 3rd day of July, 1912. That said Lawrence F. Connolly, his brothers and sister concealed the fact of the death of the said John Corbett, deceased, or failed to make it known to the other relatives and next of kin. That in May, 1910, the plaintiff heirs of said John Corbett, deceased, were first made acquainted with the fact of his death by an announcement in a newspaper, brought to them by some friends and neighbors. That they being illiterate and unable to either read or write, procured the assistance of a friend to write their mother of the death of their uncle John Corbett; believing at the time that their mother was his sole heir, and have at all times since acted on such hypothesis since the death of the said John Corbett was made known to them, until they were informed in August, 1916, that they were the heirs of said John Corbett, deceased, in their own right, and independent of that of their mother. That soon after the death of said John Corbett was made known to them, they consulted J. W. Davidson, an attorney and sounselor at law at Pittsburgh, Pa., and he informed them that they had no right or interest in the estate of John Corbett,

deceased, as their mother was the sole heir, and they being her heirs, they could have no interest in the Corbett estate until her death. Like information was given to them by Henry G. Connolly, Solicitor, of Clifden, Galway County, Ireland, on or about the 25th day of October, 1911; and by Arthur Schmidt, attorney and souncelor at law at Pittsburgh, Pa., on or about the 9th day of December, 1912; and about the same date by Elder & Elder, attorneys and counselors at law, at Coeur d'Alene, Idaho. That they were repeatedly told by friends and neighbors, who possessed a school education, and in whose ability and integrity they had full confidence and respect, that their mother who was the next of kin of said John Corbett, deceased, was his heir and entitled to his estate. Plaintiffs believed such statements in connection with and confirmatory of the several statements of said attorneys and counselors at law. That their mother Bridget Madden died on the 26th day of August, 1914, and soon thereafter plaintiffs consulted said J. W. Davidson, who then informed them that they had no right in or to the estate of John Corbett, deceased, for the reason that the Supreme Court of the state of Idaho had determined on two occasions that their mother Bridget Madden had no right, and since she had no right they could have no right. That about the first of the year 1916, plaintiffs called on Bradley McK. Burns, an attorney and counselor at law, at Pittsburgh, Pennsylvania, and he undertook to investigate the matter in their behalf, and told them that he feared that their cause was hopeless. That

soon thereafter a rumor came to these plaintiffs, which they were unable to verify, that the said Connollys had destroyed the last will and testament of said John Corbett,, deceased, which by its terms made Bridgett Madden his sole heir. That of this fact plaintiffs informed the said Bradley McK. Burns, and he told them that it would be necessary for him to make a trip to Idaho and the state of Nebraska in order to get exact information as to the status of the Corbett estate, and other facts in connection with the matter that might be beneficial to the said plaintiffs as the heirs of Bridgett Madden, deceased. That if he did not do it himself that he advised that some one qualified do so at once. That on or about the 10th day of August, 1916, plaintiffs left their homes in the state of Pennsylvania, and same to Spokane, Washington, and procured the services of Mr. Caleb Jones, an attorney and counselor at law, to go with them to Coeur d'Alene, Idaho, having traveled from their home, a distance of two thousand eight hundred miles, to make an investigation of the court records at Coeur d'Alene, Idaho, and other matters pertinent to and concerning the estate of the said John Corbett, deceased. That, plaintiffs with Mr. Jones made an investigation of the court records as aforesaid, on or about the 16th day of August, 1916, and these plaintiffs were then for the first time informed that the estate of the said John Corbett, deceased, was no longer under the control of the court, and that it had been distributed to the said Lawrence F. Connolly, John J. Connolly, William Connolly and Ellen Udell

That, after the investigation of said court records at Coeur d'Alene, Idaho, and on the same day plaintiffs returned to Spokane, Washington, and employed Mr. Jones to investigate and advise them what if any interest they had in the estate of John Corbett, deceased, as the heirs of said Bridget Madden, deceased. He undertook the investigation of the matter, and in the course of a week informed them, that in his judgment, there was no chance to recover any of the assets of the Corbett estate, as representatives of their mother, for she had no right in the beginning at the time of the death of John Corbett, and had failed to initiate one within the time prescribed by the statutes of Idaho; but further advised them, that in his judgment without making further investigation of the law and the facts, and without being final, that they were then, and had been since the death of the said John Corbett, his next of kin in the United States, and his heirs, and as such entitled to inherit his estate. That this was the first time, that either of the plaintiffs, were ever informed, or had brought to their knowledge, that they were the heirs of John Corbett, deceased, or that they had any right title or interest, in and to the estate of John Corbett, deceased, by reason of their being the next of kin in the United States, and residents and citizens thereof at the date of the death of said John Corbett; and also the first time that they had brought to their knowledge the facts of the alleged fraud of the defendants Connollys and their sister Ellen Udell, on the Probate Court and against them.

The plaintiffs then formally employed the said Caleb Jones, as their attorney and counsellor at law, with full power to make settlement of the matter with the said Connollys and their sister Ellen Udell, in or outside of the courts, and with or without any legal proceeding, and with the understanding that he make such further investigation of the law and the facts, and to employ or associate such additional counsel as he thought proper; and, if after such further investigation he felt confirmed in his judgment of the rights of the plaintiffs as the heirs of the said John Corbett, deceased, he was to proceed as their attorney and counselor at law, and in their behalf commence such legal proceedings as he deemed necessary, and in such court or courts as to him seemed proper.

The said Caleb Jones in pursuance of said agreement, did on the 21st day of August, 1916, write to the defendant, Lawrence F. Connolly, a letter, stating therein the claims of the plaintiffs, and inviting a settlement or adjustment thereof without the interposition of the courts, to which no reply was made.

That thereafter on the 11th day of September, 1916, these plaintiffs, by their attorney, Caleb Jones, submitted the question of the rights as the heirs of said John Corbett, deceased, to Messrs. Graves, Kizer & Graves, a very reputable firm of layers, in the city of Spokane, state of Washington, and was by them finally advised on the 2nd day of October, 1916, that Bridgett Madden possessed a right, but since her

right had been foreclosed both by reason of failure to assert it within the statutory time, and bar of the judgment against her, it foreclosed all those in privity with her, and that the plaintiffs are in privity with her.

Thereafter, on or about the 10th day of October, 1916, the same question submitted to the said Messrs. Graves, Kizer & Graves was submitted to Messrs. Voorhees & Canfieid, another reputable and distinguished firm of attorneys and counselors at law, at Spokane, Washington, who on the 7th day of March, 1917, after careful consideration, advised said Caleb Jones, that they had gone very thoroughly into the various questions involved and considered plaintiffs' claims in the premises meritorous.

That on the 24th day of March, 1917, written demand was made upon the defendants Connollys for the property of the Corbett estate, to which demand no attention was paid, and on the 29th day of March, 1917, this cause was filed in the District Court of the United States, for the District of Idaho, Northern division.

These facts not only answer directly the question of the time of the discovery of the fraud and mistake, but show the reason why plaintiffs did not make an earlier discovery of the fraud and mistake alleged They not only avoid the statute of limitation that has been invoked by the defendants, but conform to the rules of Equity pleading. For a court to as-

sume in the face of these allegations, that because plaintiffs knew one fact or two facts, that they must perforce know all other facts in connection with the administration of the affairs of said estate, and their consequential fraud upon them, without knowledge of their interest, cannot stand the test of law or rule of reason. In the absence of any statute on the question of fraud or mistake, the same rule would apply in this cause.

Justice Story said in the case of *Pratt vs. Northam,* 5 Mason 95, Fed. Case No. 11, 376 page 1261:

> "It is said that fraud even at law constitutes a good exception to the statute of limitations; and for a higher reason has been often admitted in equity. This, in a general sense is true as to the common statute of limitations, but, the fraud must be the fraud of the party setting up the bar of the statute."

In the case of *Prevost vs. Gratz, et al,* 6 Wheaton 481, it is stated:

> "It is certainly true, that the length of time is no bar to a trust clearly established and in a case where fraud is imputed and proved length of time ought not upon principles of eternal justice to be admitted to repel relief. On the contrary, it would seem that the length of time, during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief."

In the case of *Michoud vs. Girod,* 4 Howard 561, it is stated:

"In general the length of time is no bar to a trust clearly established, and in case where fraud is imputed and proved, length of time ought not upon principles of eternal justice to be admitted to repel relief.' *Provost vs. Gratz, et al.,* 6 Wheaton 481. There is no rule in equity which excludes the consideration of circumstances, and in case of actual fraud we believe that no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom fraud is proved."

"A judgment fraudulently procured, is a fraud upon the court and upon the injured party." Sec. 919, Pomeroy's Equity Jurisprudence, 3rd Ed.

"In a fraudulent probate,, equity will declare the person deriving title under it,, a trustee for the party defrauded." Sec. 919, Id.

STATUTES NOT TO APPLY UNTIL THE DISCOVERY OF THE MISTAKE.

On the reading of plaintiffs' complaint it becomes evident, that the plaintiffs were laboring under a mistake as to their rights in the estate of John Corbett, deceased. Not a mistake that may come from negligence or passivity, but such a mistake as may be made by the vigilant and reasonably careful person. It must be conceded that the plaintiffs being the next of kin resident in the United States, became the heirs at law of John Corbett, deceased, and under the laws of Idaho were entitled to succeed to his estate. The probative facts alleged in the complaint, plainly show that plaintiffs were not only laboring under a mistake, but show conclusively the date of their first

discovery, which was in August, 1916. Any discussion or reference to this question seems to have been eschewed by the trial Court. The same statement of facts set forth in our argument on the question of the time of the discovery of fraud, is applicable to the time of plaintiffs' discovery of their mistake. A mistake has been defined, as follows:

> "'Mistake,' some intentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence." *Chicago & E. I. R. Co. vs. Hay,* 10 N. E. 29.

In applyging this definition to the allegations of plaintiffs' complaint, we find every element of mistake set forth.

> "'Mistake,' as used in the statutes which confer jurisdiction in cases of 'Mistake' on courts of equity, is not limited to mistake of facts, but the word is used as generally understood in equity proceedings, and includes mistakes of law, when combined with other elements not in themselves sufficient to authorize a court of equity to interpose, but which, combined with such mistake, should entitle the party to be relieved." *Jordon vs. Stevens,* 81 Am. Dec .556 (Me.).

In the first case of Rousmanier's Administrators, 8 Wheat. 174, 5 Law Ed. 589-600, Chief Justice Marshall, speaking for the Court, said:

> "It seems that a court of equity will relieve in case of mistake of law merely."

In the second case of Hunt vs. Rousmanier's Administrators, 1 Pet. I, 7 Law Ed. 27-34, Justice Washington in speaking for the Court said:

"It is not the intention of the court, in the case now under consideration, to lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of the law."

"'Mistake,' as used in the Rev. St. Sec. 4057 (U. S. Comp. St. 190 I, p. 2756), providing that the postmaster general shall bring suit to recover a payment of money made by 'mistake,' includes an erroneous conclusion in the construction or application of a statute." *Wisconsin Cen. R. Co. vs. United States,* 164 U. S. 190, 41 Law Ed. 399.

The utmost that can be fairly said under the allegations of plaintiffs' complaint is, that plaintiffs made a mistake in their conception of the heirship of their mother; and it follows, "as the night the day," that they made a mistake of their own rights in and to the estate of John Corbett, deceased. Not a mistake of inertia, inactivity or negligence, but a mistake such as comes from the natural reasoning of the uninformed of the niceties of the law, and the reasoning that holds an alien sister, though next of kin, is not an heir of her resident brother dying intestate. To hold that these poor illiterate plaintiffs knew of their rights in the premises, and made no honest mistake in the matter is too grotesque to be thought of. That they asked men presumed to be learned in the law and were informed that they were not the heirs of John Corbett, deceased, but that their mother was, as they had conceived in the first instance, when they were fortuitously informed of their uncle's death, changes not the question of mistake, but only presents reasons for their perseverence therein. If some of the at-

torneys and counselors had informed them that they were the heirs of John Corbett, deceased, then, that would have given the question here presented a very different aspect, and it would have afforded some basis for the contention that the plaintiffs should have known of their rights, and consequently of the acts of fraud perpertrated upon them by Lawrence F. Connolly, the administrator of the estate of their uncle, John Corbett, deceased.

THE STATUTE DOES NOT APPLY TO SUIT IN EQUITY.

Appellants in this case seek to impress upon this Court that the case at bar is one of exclusive equity jurisdiction. Fundamentally, it rests on an equitable basis, and the remedy sought is purely equitable. It has no prototype in actions at law, and in such cases courts of equity do not recognize the rule cited by the trial Judge in the case of Frishmuth vs. Farmers' Loan & Trust Co., 95 Fed. 5, that:

> "All courts of equity feel themselves bound, in in all cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances; whether they act in analogy or in obedience to those statutes is not of practical moment."

This is not a case similar to any case at law, or one that law courts have concurrent jurisdiction, for it is purely equitable, and is alone subject to the gen-

eral rule, announced in the same case of Frishmuth vs. Farmers' Loan & Trust Co., *Supra,* to wit:

> "As a general rule length of time is no bar to a trust clearly established, and express trust are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the *cestui que trust.*"

This presents another illustration of the absolute failure of the trial Court to regard the trust relationship existing between the parties to this cause, in his application of the law to the questions involved.

> "In courts of law and equity having concurrent jurisdiction, the statutes of limitation applies, not otherwise." *Bank of U. S. vs. Daniel, et al.,* 9 Law Ed. 999.

> '"Courts of equity do not consider themselves bound by the statutes of limitation, when their jurisdiction is not concurrent with those of law.' It has been said that Federal courts of equity will never follow a state statute of limitation when there by manifest wrong and injustice would be wrought." Foster Federal Practice, 4th Ed. Sec. 8.

> "It has been thoroughly settled that the jurisdiction of courts of equity cannot be limited or enlarged by state legislation nor its general powers effected by such legislation." A Federal Equity Suit, (Simkins) 3rd Ed. page 17.

> "Equity jurisdiction conferred on Federal courts is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union." *Payne vs. Hook,* 7 Wall. 425.

> "Equity jurisdiction of courts of the United States, is the same as that of the High Court of Chancery in England possessed. It is subject to neither limitation nor restraint by state legislation, and is uniform throughout the states of the Union. * * * In view of these authorities it is clear that the statutes of New York upon the subject of limitation does not effect the power and duty of the court below." *Kerby vs. Lake Shore, Etc., R. R. Co.,* 30 Law Ed. 572-3.

Justice Grier, in speaking for the Supreme Court of the United States, in the case of Stearns Adm'r vs. Page, 12 Law Ed. 928, on the question of limitation addressed to courts of equity, said:

> "They also interfere in many cases to prevent the bar of the statute where it would be inequitable or unjust: as for example, if a party has perpertrated a fraud which has not been discovered until the statutable bar may apply to it in law, courts of equity will interpose and remove the bar out of the way of the injured party. In cases of mistake also, as well as fraud, they will not consider the statute as running till after the discovery of the mistake, and laches cannot be imputed to the injured party until the discovery of the fraud or mistake has been made."

The case of Sullivan vs. Andoe, 6 Fed. 641, is very similar in many respects to the one at bar. In 1866 Edward Sullivan died at St. Louis, Mo. To procure the distribution to Rosanna Andoe and himself, Henry Murta, represented to the Probate Court that they were the next of kin and heirs of the said Edward Sullivan, and in 1869, by reason of said representations the residue of the estate was distributed to

them. In 1879, Emily Sullivan instituted a suit in equity to establish her right as an heir, the establishment of a trust, and an accounting by those wrongfully in possession of the property; and on proving the fraud practiced on the Probate Court, the court awarded the relief prayed for over the objections based upon the statute of limitations, lapse of time, laches and delay in filing her bill.

STATUTES OF LIMITATION DO NOT APPLY TO TRUSTS.

Trusts that are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of court sof equity, are not effected by the statute of limitations. 25 Cyc. 1153.

> "As a general rule length of time is no bar to a trust clearly established, and express trust are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the *cestui que trust. Frishmuth vs. Farmers' Loan & Trust Co.,* 95 Fed. 5.
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> "It is certainly true, that length of time is no bar to a trust clearly established." *Prevost vs. Gratz ,et al.,* F *Wheat.* 481, 5 Law Ed. 315; *Michoud vs. Girod, et al.,* 4 How. 561, II Law Ed. 1102.

An examination of the decision of the lower Court (Transcript page 69-70) will reveal the Judge speculating as to what the plaintiffs might have done, had they known all the details of the acts of the administrator in his administration of the estate of John Corbett, deceased, and then says:

> "In other words, it is patent that they were not injured by their ignorance of the defendants' illegal claim, and for us to now say in a case of such doubtful rights, they could, after learning the facts, remain inactive for a period of almost twice the length of time prescribed by the statute of limitations, for no other reason than that the advice they took from time to time was unfavorable, would be to entirely set at naught the statute of limitations."

The first question suggested upon an analysis of this extract, is, what facts does the Court refer to? Surely, not the fact that they were the heirs of John Corbett, deceased, for of this primary and all important fact, which represents the key that would have unlocked the door of knowledge, the bill of complaint shows that they had absolutely no knowledge of until August, 1916. On their knowledge of this fact must rest the application of the knowledge of all other facts in the premises, actually known or presumed to be known, in connection with the "defendants' illegal claim," and the consequent fraud on plaintiffs' rights. Without it all avenues of action on their part was closed. Without it they dwelt in "ignorance of defendants' illegal claim," while with it a discovery of the fraud and its application to them, was possible to be made. If they labored under a mistake to their injury, and to defendants' advantage for so long a time, is it reason why only a particular part of the statute of limitation should be enforced, and that portion which provides, that,

> "An action for relief on the ground of fraud or mistake. The cause action in such case not

> to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake,"

be set at naught, without the least hesitation whatever, when its basis rests on that principle of eternal justice * * * the ultimate righting of all wrongs. There can be no question but what the all important question of heirship of the plaintiffs would have to be alleged and proven before fraud or mistake could be predicated, upon the other facts referred to by the learned Judge of the trial court, or the plaintiffs would find themselves in the same predicament as their mother in the cases of Connolly vs. Reed and Connolly vs. Probate Court, *Supra,* * * * a party without interest in the subject matter of the suit attempting to raise the question of fraud. But why this seeming fear of "setting the statute of limitations at naught" or rather construing it in harmony with its own provisions and in keeping with principles of right and justice and most honored precedent. It has been repeatedly done, in times past, by the highest tribunals of our land, concededly on the same high principles of morality, and no doubt, on like hallowed grounds will be repeated by the courts in the future. Such acts have received the approbation of ages, and have become thoroughly recognized as a part of our equity jurisprudence. "It has been said that a Federal court of equity will never follow a state statute of limitation when thereby manifest injustice and wrong would be wrought."

ASSIGNMENT OF ERROR NO. 5.

> "That the Court erred in dismissing plaintiffs' complaint on the ground, that, plaintiffs are barred from a recovery by reason of their apparent laches."

The trial Court in his consideration of this question treated it as a question of law, and with the same absolute disregard of equitable principles and doctrines as is shown in his treatment of the other questions involved in this cause. In fact, an examination of his decision will show that the doctrine of laches as an equitable defense, in this cause, has been regarded simply as a matter of limitation in a law case. Rules of construction laid down in cases where courts of law and equity have concurrent jurisdiction are applied to the case at bar regardless of the fact that it is one of exclusive equitable cognizance. In consideration of the question of laches, on a motion to dismiss before issue joined, the facts alleged in the complaint must control, and speculation dehors the record should have no place in the consideration of the question. The following rule of equity pleading is quoted in the trial Court's decision, to which the sufficiency of plaintiffs' bill of complaint is cheerfully submitted, and the measurement of the facts therein, tested thereby.

> "Whenever any delay in the bringing of your suit appears you must, to properly state your case, anticipate this defense, and reasonably excuse the delay, such as the existence of some disability, or a fraudulent concealment of the facts by the defendant, or it must be shown that in the

> nature of things the cause of action of fraud perpertrated could not sooner have been discovered. There must be distinct averments when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that a court may clearly see whether, by the exercise of ordinary diligence, the discovery could have been sooner made." A Federal Equit Suit (Simkins) 3rd Ed. page 281.

Does not plaintiffs' complaint show an anticipation of the defense of laches? Does it now show that the real cause of delay in bringing this action was owing to plaintiffs' lack of knowledge of even the death of their uncle for more than a year after defendants fraudulently procured a decree of distribution to themselves of his said estate, and that owing to their mistaken conception, that their mother was the sole heir at law of her brother, said John Corbett, deceased, and therefore, they as nieces were not his heirs at law? Does the complaint not show their disability to bring this action, being married women? Does the complaint not show that it was sometime in August, 1916, that they discovered the all important fact that they were the heirs at law of said John Corbett, deceased? Does the complaint not show diligence on their part as soon as they discovered the fraud perpertrated on them? Does the complaint not show the successful concealment or suppression of the fact of John Corbett's death by the defendants, and their procurement of a decree of distribution of his estate to themselves unbeknown to his heirs at law? Does the complaint not show that Lawrence F

Connolly knew, that he and his brothers and sister, were not the heirs at law of John Corbett, deceased? Does the complaint not show that the decree of distribution of the Probate Court of Kootenai County, Idaho, was procured by reason of knowingly false and fraudulent representations of Lawrence F. Connolly, while acting as administrator of said estate? and that the fraud was not discovered as to these plaintiffs until they had knowledge that they were the heirs of said John Corbett, deceased?

"That there must have been knowledge on the part of the plaintiffs of the existence of their rights, for there can be no laches for failure to assert rights of which a party is wholly ignorant of." Does the complaint not show that, "in the nature of things the cause of action of fraud could not sooner have been discovered"? It is a self-evident matter of impossibility to make a discovery of their cause of action, before discovering the fact that they were the heirs of John Corbett, deceased. Distinct averments are made in plaintiffs' bill of complaint, of the time of the discovery of the frauds perpertrated upon them, see paragraph XL, Transcript page 24-25. It is true that the plaintiffs knew of the death of their uncle, John Corbett, in May, 1910, but that knowledge was not brought to them by either of the defendants. It is true that they knew of the litigation of their mother in a general way, in her efforts to secure the estate of John Corbett, her deceased brother; but, it is not true, nor can there be justly drawn any inference from

plaintiffs' bill of complaint, that the plaintiffs knew of their rights, before the date alleged, to wit, August, 1916. While the proceedings of the Probate Court of Kootenai County, Idaho, were matters of public record, it would make no difference, for the rule as announced repeatedly by the Supreme Court of the United States, is:

> "If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest, and knows that proceedings are pending, the result of which may be prejudicial to such interest, he is bound to look into such proceedings so far as to see that no action is taken to his detriment." *Foster vs. C. & L. M. R. Co.,* 155 U. S. 449-452, 36 Law Ed. 903.

Having, I hope, thus demonstrated to this Court that plaintiffs have conformed in each particular with the requirements of the rule of pleading cited by the trial Judge, it will now be my endeavor to make further and closer application of the principles of equity to the question of laches. What is laches? It has been ably defined a great many times by the highest and most respected judicial authorities, usually according to the circumstances of each particular case, yet, always with the announcement of some elemental principles, therefore I have selected but two definitions from the many for the answer of the query.

> "Laches is such negligence as results in the omission to do what one is by law required to do to save a right, and which warrants a presumption

that the claimant has abandoned it and declines to assert it. When the assertion of the right is neglected or omitted for a period of time more or less great, and under such circumstances as to cause prejudice to an adverse party, it may operate as a bar in equity. Although a proper ingredient in the law of laches, the instances seem to be rare where Courts have declared that mere lapse of time might effect a positive bar, even in cases of purely equitable jurisdiction; while, on the other hand, relief has been frequently granted, notwithstanding great delay, when substantial justice could yet be done between the parties. Therefore mere lapse of time, where the parties remain in the same relative position, the delay working no serious wrong to the adverse party, and justice being possible, will not operate as a bar in equity." *Hamilton vs. Dooly,* 15 Utah 280, 49 Pac. 769-772.

"The length of time which a party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case and is not like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the right such, that it would be inequitable to permit plaintiff to now assert them. There must of course have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he has no reason to apprehend. And yet, as said by Justive Brown, in speaking for the court in Foster vs. C. & L. M. R. Co., *Supra*s 'The defense of a want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; hence the tendency of courts in recent

> years has bee nto hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts." *Halstead vs. Greman,* 152 U. S. 410-413, 38 Law Ed. 495-497; see also *Alsop vs. Ricker,* 155 U. S. 449-452, 39 Law Ed. 218-223.

Appellants contend that there is absolutely no justification for the inference, that plaintiffs abandoned or declined to assert their claim. They allege that they knew not of the existence of their right until August, 1916, being the time that they were informed that they were the heirs of John Corbett, deceased, and immediately on learning of their right took prompt action, and since have been diligent in their prosecution of their cause. Unless their failure to learn of the death of John Corbett, in the first instance, or their failure within sixty days to appeal from the decree of distribution of his estate entered more than a year before they learned of his death, or their failure and inability to earlier learn of the fact of their heirship, or make an earlier discovery of their mistake in this respect, which is not bounded by statutory provisions, there is not in the complaint, even a suggestion that they declined to prosecute their claim, or in any manner abandoned it. If the doctrine of laches is to become less equitable than even the laws of limitation, and there is no redress for honest mistakes, then indeed plaintiffs have been guilty of laches, unless this Court will continue to assert the old time honored principle, that such neg-

lect "must cause prejudice to the adverse party." It was said in the case of Hudson vs. Cahoon, 91 S. W. 77, "Where plaintiffs' delay does not operate to injure defendant, plaintiff is not barred from relief by laches" and "so long as the relative positions of the parties are not altered to the defendant's prejudice, delay is of very little consequence."

> "Where the parties remain in the same relative position, and the delay has worked no serious wrong to the adverse party, so that justice can still be done, the claimant should not be refused relief on the ground of laches." *Just vs. Idaho Canal Co.,* 16 Idaho 653, 102 Pac. 381.
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> "Twenty-four years' delay, held not laches, where neither defendant nor grantee were prejudiced." *Godkin vs. Cohn,* 80 Fed. 458; *Hubbard vs. Manhattan Trust Co.,* 87 Fed. 51.
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> "Where heirs were induced to believe that they were not entitled to any part of their father's estate until the youngest became of age (a period of sixteen years), their delay until that time to assert their claim is not such laches as will deprive them of their rights." *Thomas vs. Armstrong,* 12 Fed. 666.

There is absolutely no suggestion in plaintiffs' bill of complaint, which constitute the only facts which should be considered, that the delay in bringing this action has worked any wrong to the adverse parties. There is absolutely no suggestion in the bill of complaint that the plaintiffs' delay has changed the relative positions of the parties to the defendants' prejudice, unless the matter is viewed on the basis that the taking from the thief of the stolen goods and their

restoration to the lawful owner is prejudicial to the thief's interest. There is absolutely no inference or suggestion of any interference with the rights of innocent parties to be found in the record of this case, and the nearest approach to it is to be found in the decision of the lower court, wherein the Judge says:

> "Possibly the rights of innocent parties have not grown up, but it may very well be that the defendant Lawrence F. Connolly has for some time acted on the assumption that, after being drawn into court three times touching the probity of his conduct and the propriety of his claim to be one of the heirs of the deceased, he would be exempt from further harrassment."

From the facts alleged in plaintiffs' bill of complaint, this inference of Lawrence F. Connolly's "probity," and "propriety of his claim to be one of the heirs of the deceased," is certainly very extraordinary. If it is, as alleged, that he represented, that he and his brothers and sister were the cousins of John Corbett, deceased, and they concealed his death from his sister and other relatives, and secured a decree of distribution of the property of his estate to themselves, and when the sister and true heirs accidently became acquainted with the death of John Corbett, and Lawrence F. Connolly learned of their acquaintance with said Corbett's death, he, with the characteristic blundering of every criminal, hastened to Ireland, with the funds of the Corbett estate still in his hands, and he still acting as administrator and trustee of the lawful heirs of the estate by the use of fraud, deceit and misrepresentation, and by surrender-

ing a tithe of her brother's money to her, procured an assignment to himself, from a poor blind old lady of 85 years of age, decrepit, and unable to either read or write, and with a failing understanding of the affairs of this world, of a presumed interest that he thought she had in her brother's estate, be any indication of "probity" and the "propriety of his claim," then I confess an absolute misunderstanding of the terms. If such is probity then what is its antithesis?

Laches is an equitable defense, controled by equitable considerations, and lapse of time must be so great that the relations of the defendants to the rights such that it would be inequitable to permit plaintiffs to now assert them. What in plaintiffs' bill of complaint shows that it would be inequitable, to direct the estate of John Corbett, deceased, be paid over to his rightful heirs at law, at this time. The learned trial Judge said:

> "Assuming, without deciding, that the plaintiffs were more closely related to the deceased than the distributees, and that, after their mother, they were next of kin, and that by reason of their mother's alienage disqualifying her from inheriting they became the heirs at law of the deceased, not through their mother, but in their own right."

In all fairness should there not some affirmative facts appear in plaintiffs' bill of complaint, from which proper deductions could be made, that it would be inequitable to take property wrongfully in

the possession of the defendants and deliver it to the plaintiffs, recognized as the lawful owners?

> "The defence of laches is not a mere matter of time, like limitation, but it is a question of the inequity of enforcing the claim." *Hubbard vs. Manhattan Trust Co.,* 87 Fed. 51.

Is it inequitable to compel the administrator of an estate, as the trustee of the heirs of such estate, to distribute the same in accordance with the mandate of the law, even, though he has retained for a long time, and appropriated to his own use and benefit, the property that he knew belonged to the lawful heirs?

"It has been held that the lapse of time will not bar an established equity." London & S. F. Bank vs. Dexter Horton, 126 Fed. 601, "and where it would not harm innocent persons, gross fraud was held to do away with the defense of laches." McIntire vs. Pryor, 173 U. S. 54; and that "Absence of complaint from the state and late discovery of the fraud, are excuses for delay." Hallett vs. Collins, 10 How. 175-187, 13 Law Ed. 376-381; and "in case of fraud upon the part of an administrator, in which each of the defendants participated, a court of equity should be slow in denying relief upon the mere ground of laches in bringing suit." Bryan vs. Kales, 134 U. S. 126-136, 33 Law Ed. 829. The enforcement of these equitable principles does not, to appellants' mind, indicate any disparagable astuteness on the part of courts to point a way by which defrauded heirs may recover their distributive share of an estate, in the hands of

their trustee and administrator of the estate. Nor is it equitable to estop the daughter heirs from doing so, because of their foreign mother's failure to establish her heirship, even though with their encouragement, under the alleged circumstances of this cause.

The points and authorities mentioned in the discussion of the foregoing assignment of error, we respectfully ask to be applied to assignments of error designated six, seven and eight.

In conclusion permit appellants to say, that in their humble judgment, the errors complained of are all owing to the failure of the learned trial Judge to appreciate the trust relationship existing between the heirs of an estate and the administrator thereof.

Respectfully submitted,

CALEB JONES,
Solicitor for Appellants.